STATE OF MICHIGAN

COURT OF APPEALS

SHARON LUNDIN,

Plaintiff-Appellant,

v

CITY OF BENTON HARBOR,

Defendant-Appellee.

UNPUBLISHED
March 13, 2007

No. 264915
Berrien Circuit Court
LC No. 2004-003312-CZ

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

SMOLENSKI, J. (*concurring in part and dissenting in part*).

In this hiring dispute, plaintiff appeals as of right from the entry of judgment in favor of defendant after a bench trial.

I. Facts and Procedural History

In August 2002, plaintiff applied for a police officer position with the Benton Harbor Police Department (the Department). At the time plaintiff applied, the Department was operating under a hiring policy adopted in February 1998. The hiring policy required applicants to submit a completed application form and achieve a 70 percent or higher score on a written examination, after which they were required to submit to a background check. Those who passed the background check were invited for an oral interview. Applicants who passed the oral interview were then placed on an eligibility list. The applicants on the list were ranked by their combined written examination and oral interview scores. After the Civil Service Board certified the list, and a position that the city decided to fill became available, the Department had to make an offer of employment to the first person on the eligibility list. However, the offer was conditional upon the candidate receiving police certification from the Michigan Law Enforcement Officers Training Council (MLEOTC) and passing a physical examination, a psychological evaluation, a drug test, and vision and hearing tests. Subsequent vacancies were to be filled by the remaining candidates on the eligibility list. Once an eligibility list was certified, it remained in effect for two years or until there were no more candidates on the list.

Under the hiring policy, if a candidate was not certified by the MLEOTC, the Department was required to send the candidate to the first available MLEOTC Regional Police academy at the Department's expense. While the candidate attended the academy, the Department paid the candidate a training wage and provided benefits. Milton Agay, the former Public Safety Director for Benton Harbor, testified that the policy was designed to give community members the

opportunity to become Benton Harbor police officers, and it specifically targeted women and minorities who could not afford to be certified.

Plaintiff passed the written examination, the oral interview and the background check. Based on her combined written and oral scores, she was placed on the eligibility list. She was ranked number four. The Department submitted the list to the Civil Service Commission for certification in October 2002. The Civil Service Commission certified the list. The first two candidates on the list, who had their certifications, were hired. The next candidate on the eligibility list, who was also certified, was offered a job but failed one of the examinations and the offer was withdrawn. At this point, plaintiff was the only remaining candidate on the eligibility list.

The Department, however, never contacted her. In December 2002, plaintiff contacted the chief of police to discuss attending the police academy. His secretary informed plaintiff that she would need to speak to the city personnel director, who told plaintiff that the city was no longer sending people to the police academy. When plaintiff complained that the city was not following the hiring policy, the city personnel director told her that the decision came directly from the police chief. He also told plaintiff that the city's decision was based on the fact that the city had sent too many people to the police academy who then left for better jobs. At trial, the police chief testified that another reason for the policy change was that it cost too much money to send people to the academy and, if the city hired certified candidates, they would be on the job much more quickly.

In August 2004, plaintiff sued the City of Benton Harbor. In her complaint, plaintiff alleged that the Department refused to hire based on her gender or age in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., and, in a separate count, petitioned the trial court to exercise its superintending control to order defendant to place her at the top of the hiring list. After a bench trial, the court determined that plaintiff failed to state a cause of action for either of her claims.

This appeal followed.

II. Admissions

Plaintiff first argues that the trial court erred when it refused to admit into evidence a request for admissions that plaintiff had served on defendant prior to the close of discovery, but that defendant had not answered. Because I believe plaintiff's request was untimely, I conclude that it was within the trial court's discretion to refuse to consider it as evidence. Therefore, I must respectfully dissent from the majority opinion on this issue.

Whether the trial court properly interpreted the applicable court rules is a question of law that this Court reviews de novo. *CAM Construction v Lake Edgewood Condo Assoc*, 465 Mich 549, 553; 640 NW2d 256 (2002). When construing a court rule, this Court applies the same legal principles that govern the construction and application of statutes. *People v Phillips*, 468 Mich 583, 589; 663 NW2d 463 (2003). Accordingly, when the language of the court rule is unambiguous, this Court will enforce it as written, without further judicial construction or interpretation. *Grievance Administrator v Underwood*, 462 Mich 188, 194; 612 NW2d 116 (2000).

Under MCR 2.312(A), a party may, within the time for completion of discovery, "serve on another party a written request for the admission of the truth of a matter . . . stated in the request that relates to statements or opinions of fact or the application of law to fact, including the genuineness of documents described in the request." A party served with a request to admit must normally object to the request or answer it in writing within 28 days of being served or the request is deemed admitted. MCR 2.312(B)(1). However, it is within the discretion of the trial court to shorten or lengthen the time within which a party is required to answer a request to admit. *Id.*

In the present case, plaintiff served defendant with a request to admit on May 11, 2005. Hence, defendant would normally have had to object or answer the request by June 8, 2005. Defendant elected not to respond to the request. At the bench trial, plaintiff moved for the admission of the request to admit. Defendant responded by arguing that it was not required to answer because the request was served less than 28 days before the close of discovery and, therefore, was untimely. Plaintiff responded that MCR 2.312(A) only required the requesting party to serve the request before the close of discovery. It did not require the requesting party to leave adequate time for the served party to answer within the time set for discovery. The trial court disagreed and concluded that the request was untimely. Therefore, it refused to admit the request for admissions into evidence.

Admissions under MCR 2.312 are "'formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.'" *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420; 551 NW2d 698 (1996), quoting 2 McCormick, Evidence (4th ed), § 254, p 142. Because a request to admit does not seek to discover a fact or opinion that is unknown to the requesting party, it is not, in a technical sense, a discovery procedure. See *Gluck v Ansett Australia, Ltd.*, 204 FRD 217, 218-219 (D DC, 2001) (noting that there was a split of opinion within the federal courts as to whether a request to admit was a discovery procedure subject to the discovery deadline under the federal rules of procedure). However, because MCR 2.312 serves the purpose of narrowing the disputed factual issues, when used properly, it serves as a tool to limit and define the areas that are subject to discovery. In this sense, it is a discovery tool. This is consistent with the placement of MCR 2.312 in the subchapter of the court rules dedicated to discovery. In addition, by its own terms, MCR 2.312 is limited to matters within the scope of discovery, as provided by MCR 2.302(B), and must be served "[w]ithin the time for completion of discovery . . . ." See MCR 2.312(A). Finally, treating a request to admit as a discovery procedure subject to the discovery deadline is consistent with the "just, speedy, and economical determination of every action . . . ." MCR 1.105; see also *Gluck*, *supra* at 219. For these reasons, I conclude that MCR 2.312 is, for purposes of the court rules, a discovery procedure subject to the general rules applicable to discovery, including MCR 2.301(A), which requires the trial court to issue an order setting the time for the completion of discovery under MCR 2.401(B)(2)(a). Because discovery must be *completed* by the date established by the scheduling order, see MCR 2.401(B)(2)(a), a party serving a request to admit must serve the request at least 28 days before the discovery deadline or it will be untimely.[1] For these reasons, I

[1] As already noted, the trial court has the discretion to shorten or extend the period within which
(continued…)

would conclude that the trial court did not err when it determined that plaintiff's request to admit was untimely and, on that basis, declined to admit the request into evidence.

III. Elliott-Larsen Civil Rights Claim

Having concluded that the trial court did not err in refusing to admit plaintiff's request for admissions into evidence, I would also conclude that the trial court did not err when it found that plaintiff failed to establish a prima facie case of discrimination under ELCRA. Therefore, I would affirm the trial court's judgment of no cause for action on that claim.

MCL 37.2202(1)(a) provides, in relevant part, that an employer may not discriminate against an individual because of the individual's sex or age. A plaintiff may establish proof of discriminatory treatment in violation of the ELCRA either by direct evidence or by indirect or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). In the present case, plaintiff attempted to establish discrimination through indirect evidence.

In an action alleging employment discrimination based on indirect evidence of discrimination, the plaintiff must present a rebuttable prima facie case through proofs that would allow a fact-finder to infer that the plaintiff was the victim of unlawful discrimination. *Id.* at 134. In Michigan, our courts have adopted the burden-shifting approach set forth by the United States Supreme Court in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski, supra* at 133-134. Under *McDonnell Douglas,* a plaintiff can make a prima facie showing of discrimination by showing that (1) the plaintiff was a member of a protected class; (2) the plaintiff suffered an adverse employment action; (3) the plaintiff was qualified for the employment position; and (4) the action taken by the defendant gives rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). A plaintiff has made a showing on the fourth element, for example, when the plaintiff has presented proof that either the job was given to someone under circumstances that create an inference of unlawful discrimination or that the defendant treated the plaintiff differently than persons of a different class for the same or similar conduct. *Id.* at 468.

After the close of proofs, the trial court made the following findings of fact and conclusions of law:

> In the instant case, the court . . . finds that frankly I don't think the plaintiff has even made out a prima facie proof – case of discrimination on the basis of age or gender, for a couple reasons.
>
> For one thing, there was no evidence of her age in the record, or that her age was a factor in anything. However, I think the city acquiesces that she was – she was 40 or over. I don't know if she was or wasn't, but I guess the city acquiesces in that because it was referred to by counsel in closing statement –

(…continued)

a request to admit must be answered. See MCR 2.312(B)(1).

closing argument. So I'm going to assume that she's 40 or over, although I didn't actually hear testimony to that effect.

Secondly, the record indicates that there have been a number of females that have been hired in various positions during Chief Harris' administration. I counted 23 patrolmen – patrol officers hired during his administration, of which [] six were female, which is a little over 25 percent.

With regard to the age factor, in looking over hires, these aren't necessarily all patrol officers, but it looks like there were a number of people hired, one, two, three, four, five, six at least, that are over 40 during Chief Harris' administration. . . . So it just doesn't look like gender or age are a factor here in any employment decisions.

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There's just nothing in the record to indicate that either plaintiff's gender or her age were adverse employment factors that were used to discriminate against her, and not send her back a second time to the police academy, or hire her as a cadet, pending going back to the police academy.

Bottom line is, you know, I just don't think a prima facie case has been made. Even if I'm – if I would say that it did, I would say that the city has come forward with, and articulated, a legitimate non-discriminatory reason, which is we needed to get people in the cars, on the road, in the streets, as soon as possible. . . .

So for that reason the court finds no cause of action in this matter.

The trial court's factual findings are not clearly erroneous. Plaintiff argued, and the trial court acknowledged, that she was a member of two different protected classes: she testified that she was born in 1962, making her 40 years of age when she applied for the position, and she is clearly a woman. It was also demonstrated that she suffered an adverse employment action when defendant refused to hire her. With respect to job qualification, plaintiff was qualified for the position under the 1998 hiring policy, which was in place when she applied. The evidence did not, however, clearly establish that the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. Every person who was hired as an entry level police officer after plaintiff applied was certified—a qualification plaintiff did not possess. Moreover, the man first hired after plaintiff was passed over was hired under the new hiring policy. Also, the police chief testified that he had hired three women and four men over the age of 40 during his tenure. Plaintiff admits that many police officer candidates were hired during the two-year time period during which she was eligible and that, at least three were women, although the women were younger than 40 years of age. She also admits that males over age 40 were hired and all had established law enforcement experience. Under the circumstances, plaintiff failed to establish an inference of discrimination as to her age or sex.

Further, even if the trial court clearly erred when it found that plaintiff had not established a prima facie case a discrimination based on her sex combined with her age, see e.g. *Hall v Missouri Hwy and Trans Comm*, 995 F Supp 1001, 1005 (ED Mo, 1998); *Meyers v*

Goodwill Industries of Akron, Inc, 701 NE2d 738, 743 (Ohio App, 1997), I would conclude that the trial court did not clearly err when it determined that defendant advanced legitimate, nondiscriminatory reasons for not hiring plaintiff, which plaintiff failed to rebut. Specifically, defendant stated that it had a need for officers who were available for immediate deployment and could not afford either the time or resources to send plaintiff to the police academy. Once defendant produced legitimate nondiscriminatory reasons for not hiring plaintiff, the burden shifted to plaintiff to prove by a preponderance that the stated reason was merely a pretext. *Meagher v Wayne State Univ*, 222 Mich App 700, 711; 565 NW2d 401 (1997). Plaintiff failed to present any evidence that these reasons were merely pretexts. Therefore, I would conclude that the trial court properly granted judgment in favor of defendant on this issue.

IV. Superintending Control

Finally, plaintiff argues that the trial court erred when it determined that plaintiff had no cause for action on her claim that defendant failed to properly follow its hiring policy and the requirements of the civil service act applicable to the hiring of fire fighters and police officers. See MCL 38.501 *et seq.* We disagree.

Although MCL 38.511 governs the hiring of police officers by municipalities that are subject to the civil service act, the act does not itself provide civil remedies for violations of its terms. See *Fraternal Order of Police Labor Council v Flint Twp*, 425 Mich 382, 389; 390 NW2d 146 (1986) (noting that the only remedies codified in the act are the criminal penalties provided under MCL 38.516). Presumably for this reason, plaintiff characterized her claim that defendant violated MCL 38.511 as a petition asking the trial court to exercise its power of superintending control to order defendant to place plaintiff at the top of the current hiring list.

A writ of superintending control is an original action designed to order a lower court or tribunal to perform a legal duty. See MCR 3.302; *Shepherd Montessori v Ann Arbor Twp*, 259 Mich App 315, 346-347; 675 NW2d 271 (2003). Although decisions of municipal civil service commissions are subject to review through original actions for superintending control, see *In re Payne*, 444 Mich 679, 687; 514 NW2d 121 (1994) (opinion of Boyle, J.), plaintiff did not and has not alleged that the civil service commission failed to perform a legal duty. Instead, plaintiff claims that, because she was next on the list certified by the civil service commission in 2002, the Department was legally obligated to hire her once it elected to hire a new officer during the period that the list was in force. See *DeGrace v Shelby Twp*, 150 Mich App 587; 389 NW2d 137 (1986). Because the Department and its agents are not lower courts or tribunals, their decisions are not subject to the writ of superintending control. Therefore, the trial court properly determined that plaintiff was not entitled to relief under a writ of superintending control.

For the reasons stated above, I would conclude that there were no errors warranting relief. Therefore, I would affirm the trial court's judgment in full.

/s/ Michael R. Smolenski